Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
UNITED STATES OF AMERICA
No. 77-1015

OCTOBER TERM 1977

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DI GIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY, SAMUEL T. GERMANO, RONALD S. ZAVGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Petitioners,

-vs-

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Respondents.

-vs-

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners submit herewith by-way of Supplemental Brief in support of arguments previously advanced the recently reported cases of Detroit Police Officers Association v. Young, 16 E.P.D. ¶8147 (E.D. MICH 1978) and U.S. v. City of Alexandria, 16 FEP Cases 930 (E.D. LA. 1977).

In Detroit Police Officers Association v. Young, supra., the Court struck down a voluntary affirmative action program since there was no finding of past discrimination in promotional practices within the Detroit Police Department. The system caused the selection of approximately one black male for every white male chosen for promotion. Its effect was to pass over better-qualified white police officers in preference for black officers solely on the basis of race. As the Court stated at page 4727 of its Decision, "[t]here was, in actuality, two lists, one for white males and one for black males."

The Defendant, Police Officers Association, argued that past discrimination was illustrated by the disparity between the percentage of blacks on the employer's work force (17.23 percent) and the racial composition of the general population of Detroit (44 percent black). The Court, citing Hazelwood School District v. United States, (14 E.P.D. ¶7633), ____U.S._____, 45 U.S.L.W. 4882 (June 27, 1977), admonished that the true measure of discrimination is derived from a comparision between the composition of the employer's work force and the racial composition of those meeting the special qualifications in the relevant labor market.

The relevant labor market, viz., the area from which the bulk of all applicants are drawn, was determined not to be the City of Detroit but the Tri-County area encompassing the said City. Significantly, when the proper standard was applied, it was determined that 18.6% of the persons meeting the special qualifications in the relevant labor market were black compared

with a racial composition on the Detroit Police Department of 17.23%. Thus, pursuant to 28 C.F.R. §42.306(c) which provides:

> "a significant disparity between minority representation in the service population and the minority representation in the agency work force may be deemed to exist if the percentage of a minority group in the employment of the agency is not at least 70% of the percentage of the minority in the service population"

no discrimination was found to exist.

This Court's attention is directed to the preliminary statement of the Complaint in the action entitled John E. Howard, et al v. Elisha Freedman, et al, W.D.N.Y. CA. 74-234 wherein, for the purpose of showing past discriminatory hiring practices, Plaintiffs erroneously compared the percentage of black and Spanish surnamed police officers in the Rochester Police Department (4%) to the percentage of these minority groups in the general population of the City of Rochester (20%).

Thus, the same statistical error in the

Detroit Police Officers Association case exists in the instant case and the same result should, therefore, follow.

Not only has there never been a hearing on the merits on the issue of the existence of past discrimination but the wrong statistical comparison is advanced in the Howard Complaint in support of the contention of discrimination. Petitioners respectfully submit that without an appropriate statistical measurement of discrimination, the Consent Order, signed by the Honorable Harold P. Burke, United States District Court Judge, dated May 12, 1975, is unlawful since its necessity has not been demonstrated. As was stated by the Court at page 4742-3 of its Decision:

> "in the absence of proof of prior discrimination as claimed by the Defendants the preferential promotional plan of the Defendants clearly violates Title VII as an impermissible racial quota. 42 U.S.C. 2000E-2(a),(j). This conclusion would persist even if the instant plan had been judicially mandated since as a pre-condition to quota

type relief under the Act prior unlawful discrimination must be found to exist."

Section 706(g) of Title VII, 42 U.S.C. 2000E-5(g), provides in pertinent part as follows:

> "*If the Court finds* that the Respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the Complaint, the Court may enjoin the Respondent from engaging in such unlawful employment practice, and Order such affirmative action as may be appropriate ... or any other equitable relief as the Court deems appropriate ..." (emphasis provided)

The Federal District Court, in interpreting the above Statute, in connection with its legislative history, required a finding of unlawful discrimination stating:

> "Prior racial discrimination against blacks being absent in this case, the Court holds as a matter of law that §706(g) would not allow *any* quota regardless of whether it was voluntary or Court ordered. To do so would be to install a remedy where there has been no wrong." (emphasis provided)

In evaluating the voluntary affirmative

action plan, the Court used the standard enunciated in Washington v. Davis, 427 U.S. 229, 48 L. AD 2d 597, 96 S. CT. 2040 (1976), notwithstanding that the voluntary plan went into effect prior to this Court's Decision in Washington v. Davis, supra. The Court found, as a fact, that there was no invidious discrimination against blacks within the Detroit Police Department so as to justify the imposition of the racial promotional quota. Further application of the Washington standard by the Court led to the conclusion that the system itself intentionally and invidiously discriminated against white police officers who sought promotion as as to invalidate it absent a compelling governmental interest.

In the instant case, Respondents have never proved invidious discrimination within the Rochester Police Department so as to justify the discriminatory two list hiring system nor did they show a compelling governmental interest for the continuation of the invidious system which, on its face, discriminates

against white applicants to the Rochester Police Department. In short, Respondents have never been put to their heavy burden of proof while Petitioners have been denied their rightful judicial remedy.

Furthermore, compelling governmental interest does not lie in the imposition of racial quotas. As was perceptively written by the Federal District Court at page 4747 of its Decision:

> "The evil of the departmental quota system lies in its effect, not in its 'affirmative action' name. While the purpose of a quota system is generally compassionate its effect is intolerable because it denigrates individuals by reducing them to a single immutable birth characteristic - skin pigmentation. The concept of a quota disregards the fact that persons are not fungible goods and that special qualifications may be required for the job in question. It prefers some while excluding others on the basis of an attribute totally unconnected with the merits of the promotional candidate."

In the recently reported case of U.S. v.

City of Alexandria, 16 F.E.P. cases 930 (A.D. LA. 1977), the Court, when presented for signature with a "Partial Consent Decree" allegedly designed to cure the affects of past discriminatory hiring practices within police and fire departments in the State of Louisiana, refused to sign the Decree stating at page 931:

> "The parties have cited to this Court no case in which an issue was specifically raised concerning the rectitude of a Court's ordering a quota system merely on the consent of the parties before the Courts, without an independent determination by the Court that the tests for imposition of quotas have been met."

The tests referred to are those established by Kirkland v. New York State Department of Correctional Services, previously cited by Petitioners at page 23 of their Petition For Writ of Certiorari, viz, there must be a "clear-cut pattern of long-continued and egregious discrimination" before a racial quota is permitted. Absent such a showing, the terms of the Consent Decree are unlawful, unreasonable and inequitable.

As the Federal District Court stated:

> "If Congress intends that life-tenured members of the Federal Judiciary sign Consent Decrees which order discrimination against a large segment of our population, without any finding of past discrimination against minorities, merely in the name of expediency, it should so amend the Civil Rights Act of 1964." U.S. v. City of Alexandria, 16 F.E.P. cases supra. at page 932.

Petitioners herein have thus far been denied their right to challenge just such a Decree signed without any showing of previous discriminatory hiring practice. It is respectfully submitted that Petitioners are entitled to go forward with the instant litigation requiring the Respondents to sustain their heavy burden of proof of prior discrimination and compelling governmental interest for the imposition of the invidiously discriminatory two list hiring system at issue herein.

CONCLUSION

For the foregoing supplemental reasons, Petitioners respectfully pray that this Court will

grant the requested Writ of Certiorari to review the instant case.

Respectfully submitted,

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